CHIN YOOK WOY

v.

LOKE SUAT CHOO

HIGH COURT, PENANG
DATO' MOHAMED DZAIDDIN BIN HJ. ABDULLAH J.
[DIVORCE PETITION NO. 33-95-90]
19 JUNE 1992

FAMILY LAW: Divorce - By way of joint petition - Subsequent application for division of matrimonial property - Principles applicable - Section 76 Law Reform (Marriage and Divorce) Act 1976.

The petitioner and the respondent who were married on 23 November 1976, presented a joint petition for divorce which resulted in the marriage being dissolved on 9 December 1991.

The petitioner then applied for a share of the proceeds of sale of a property which was bought by the petitioner before the marriage and which was transfered to the name of the respondent during the currency of the marriage, who subsequently disposed of it.

The question for the determination of the Court was whether the said property was a matrimonial asset acquired during the marriage by the sole effort of the petitioner entitling him to relief under s. 76(3) & (4) of the Law Reform (Marriage and Divorce) Act 1976.

Held:

[1] The property was brought in by the petitioner after their marriage to form a matrimonial asset. The transfer of the property from the petitoner to the respondent was a mere devise to enable the latter to utilise her government housing loan of RM32,000. The said property therefore did not belong to the respondent but was held by her as a matrimonial asset.

[3] The petitioner was entitled to his half-share of the proceeds of sale of the said property.

[Application allowed. Each party to pay their own costs].

Case referred to:
Wachtel v. Wachtel [1973] 1 All ER 829 ***(refd)***

Legislation referred to:
Law Reform (Marriage and Divorce) Act 1976, s. 76(3) & (4)

For the petitioner - Gerald Samuel; M/s. Lim Kean Siew
For the respondent - John Khoo Boo Lai; M/s. Ismail Khoo & Associates

JUDGMENT

Mohamed Dzaiddin bin Hj. Abdullah J: This is the petitioning husband's application in a joint petition for divorce, (the marriage having been dissolved by this Court on 9 December 1991) for a property division under s. 76 of the Law Reform (Marriage and Divorce) Act 1976 ("the Act"). Prayer 11(e) of the Petition states:

> that the respondent do pay the petitioner the sum of RM75,000 being his share of the proceeds of the sale of the matrimonial property known as Lot No. 5088, held under H.S.(D) 4827 together with premises No. 29, Jalan SS 14/2C Subang Jaya, Selangor ("SJ1 house) erected thereon;

The issue for my determination in this application is simply whether or not the SJ1 house was a matrimonial asset acquired during the marriage by the sole effort of the petitioner within the meaning of subsection (3) read together with subsection (4) of s. 76 of the Act. The subsections read as follows:

> (3) The Court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.
> (4) In exercising the power conferred by subsection (3) the Court shall have regard to:
>
> (a) the extent of the contribution made by the other party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family;
> (b) the needs of the minor children, if any, of the marriage; and subject to those considerations the Court may divide the assets or the proceeds of sale in such proportion as the Court thinks reasonable; but in any case the party by whose effort the assets were acquired shall receive a greater proportion.

The phrase "matrimonial assets" have not been defined by the Act. However the closest that one can get to is found in *Wachtel v. Wachtel* [1973] 1 All ER 829, a decision of the English

Court of Appeal under Matrimonial Proceeding and Property Act 1970. At p. 836 Lord Denning M.R. stated:

> The phrase 'family assets' is a convenient short way of expressing an important concept. It refers to those things which are acquired by one or other or both of the parties, with the intention that they should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole. It is a phrase, for want of a better, used by the Law Commission, and is well understood. The family assets can be divided into two parts:
>
> (i) those which are of a capital nature, such as a matrimonial home and the furniture in it;
> (ii) those which are of a revenue-producing nature, such as the earning power of husband and wife. ...
>
> The matrimonial home is usually the most important capital asset.

The following facts were not disputed. The petitioner and the respondent were married at Penang Civil Marriage Registry on 23 November 1976. They cohabited at a rented house, No. 2F, Jalan Delima, Island Glades, Penang. There are five children to the marriage. On 27 January 1976 the petitioner purchased the SJ1 house for RM35,950 and after marriage they never lived in SJ1 house because both worked in Penang.

In December 1979 the petitioner transferred the said SJ1 house to the respondent for a consideration of RM44,500 and on 8 December they executed a sale and purchase agreement for the SJ1 house. Apparently, this was an arrangement between them so that the respondent could utilize a government housing loan of RM32,000 which was granted to her. In the meantime, on 14 March 1980 the petitioner personally settled the redemption sum for the SJ1 house housing loan with Malaysia Building Society Bhd. Later on 6 May 1980 he received the cheque of RM32,000 and in August 1980, the petitioner utilized the said sum of RM32,000 to purchase under joint-names another property in Taman Hajah Putih, Penang ("Penang property"). The purchase price was RM140,000 where the balance of RM98,000 was financed by Bank Bumiputra Malaysia Bhd., University Sains Malaysia Branch. Prior to the purchase of the Penang property, the petitioner purchased under joint-names another property known as No. 38, Jalan SS15/5G Subang Jaya, Selangor (SJ2) in April 1980 for RM107,000, which was partly financed by Citibank Kuala Lumpur for RM85,000 and the balance paid by the petitioner's father. However, in March 1984 he had to sell the said property for RM160,000 in order to finance the repayment of the Penang property. As this property was also under joint-names and the respondent did not get her share of the proceeds of sale when it was sold the petitioner later transferred his half share in the Penang property to her.

In the meantime, in July 1983, the respondent sold the SJ1 house to one Lee Ba Ba for RM150,000. In July 1986, the respondent left the matrimonial house and returned to her parents. When the petitioner was transferred back to Kuala Lumpur in 1988 he came to know that the SJ1 house was sold by the respondent in July 1983.

Both parties gave oral evidence and were cross-examined by Counsel. From the undisputed facts and the evidence, my findings are as follows.

With regard to the SJ1 house, the evidence showed and suggested that it was brought in by the petitioner after their marriage to form a matrimonial asset. The petitioner did not sell this property to the respondent. The transfer or the said property from the petitioner to the respondent was a mere devise to enable the latter to utilize her government housing loan of RM32,000. Although it is conceded that she continued to repay the loan by way of monthly deductions from her salary, it was not disputed that she never paid the balance of the purchase price of RM12,500 to the petitioner. In addition she did not dispute that the sum of RM32,000 was received by the petitioner after the redemption sum of the SJ1 house was settled by him and that this sum was later utilized as part-payment of the Penang property which the petitioner purchased in their joint-names. In my view, here lies the crux of the matter, which is, that the SJ1 house did not belong to the respondent but was held by her as a matrimonial asset. In view of the fact that the respondent had at first been given the half share and later became the sole proprietor of the Penang property, it is my conclusion that it was the intention of the plaintiff that when he transferred the SJ1 house he wanted it to be a

matrimonial asset to be used for their joint benefit.

It also seems clear from the evidence that both the Penang property and the SJ2 house were purchased by the petitioner but was registered in their joint-names. The respondent did not financially contribute to the purchase, but subsequently became the sole registered owner of the Penang property. From this it can be deduced that she was given her fair share of the properties without having financially contributed for their purchase during marriage. Looking it broadly, in my opinion, it represents a fair assessment of her past contributions in caring for the home and looking after the five children of the marriage. Yet, having got this property she still maintained that the SJ1 house was hers and disposed it for RM150,000. The petitioner appeared very accommodating. He was not asking for the full amount of the proceeds of sale of the SJ1 house. But felt that he was entitled to the half share which is RM75,000 from her, which to me is fair and reasonable.

Therefore, in the circumstances of the whole case and upon the considerations of subsection (4) of s. 76 of the Act, in my judgment, I allow this application as prayed. Each party shall pay his own costs .

KSM INSURANCE BERHAD

v.

CHIN TING SING CONSTRUCTION CO. & 6 ORS.

HIGH COURT, KUALA LUMPUR
DATO' HJ. ABDUL MALEK BIN HJ. AHMAD J.
[SAMAN SIVIL NO. D5-22-395-90]
13 AUGUST 1992

CONTRACT: Privity of contract - Whether party not privy to principal contract can sue under an Insurance Performance Guarantee executed in pursuance of the contract - Termination of contract by agent - Whether wrongful.

GUARANTEE AND INDEMNITY: Whether conditional - Whether arbitration clause in principal contract can be raised in proceedings under the guarantee and indemnity.

PRACTICE AND PROCEDURE: Summary judgment - Plaintiff not replying to allegations raised in defendant's affidavit - Effect of.

The plaintiff sued the defendants on a letter of indemnity which the defendants had executed in return for the plaintiff executing an Insurance Performance Guarantee with the Government of Malaysia. The plaintiff obtained summary judgment on their claim and the first, second, third, sixth and seventh defendants appealed against the decision of the SAR.

Learned Counsel for the defendants submitted that as the principal contract was between the Government of Malaysia and the first defendant, no other party not privy to the contract could sue under the Performance Guarantee as the contract and the benefit and power to claim under the Performance Guarantee was neither assignable nor transferable.

Counsel further submitted that the Performance Guarantee was conditional and the plaintiff had first to inquire whether the first defendant was relieved from performance before making any payment under it.

It was also contended on behalf of the defendants that the claim made against the plaintiff was by the State Government of Sarawak who were not a party to the contract and as such the termination of the contract and the payment made by the plaintiff were wrongful.